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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

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Toll Free Service Access Codes

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CC Docket No. 95-155

REPLY COMMENTS OF PROMOLINE, INC.

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Dated: November 20, 1995

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SUMMARY

The comments submitted in this proceeding demonstrate broad support for the anti-warehousing rules and right of first refusal the Commission has proposed. To help ensure that toll-free numbers are allocated only to those who need them, the Commission should (i) require RespOrgs to certify that each number they reserve is for an identified customer; (ii) cap the number of toll-free numbers a RespOrg may hold in reserve; and (iii) shorten the amount of time numbers may remain in "reserved" and "assigned" status.

The Commission should establish a right of first refusal in favor of 800 number subscribers because this is the most effective way for these subscribers to protect the goodwill they have developed in their 800 numbers.

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Promoline, Inc. ("Promoline"), by counsel and pursuant to 47 C.F.R. § 1.415, submits these reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

Comments in this proceeding support the adoption of three policies designed to help eliminate warehousing of toll-free numbers, as follows: (i) require RespOrgs to certify that each number they reserve is for an identified customer; (ii) cap the number of toll-free numbers a RespOrg may hold in reserve; and (iii) shorten the amount of time numbers may remain in "reserved" and "assigned" status.

The Comments support the Commission’s proposal to require RespOrgs to certify that there is an identified subscriber for each toll-free number requested from the database.¹¹

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The Comments also support requiring RespOrgs to provide this certification every three months.^{2/}

Although a few parties claim that this certification requirement is both unnecessary and administratively burdensome,^{3/} the utility of this requirement appears to outweigh the slight inconvenience it may cause. Certification is useful because it will enhance the Commission's ability to impose appropriate penalties against a RespOrg that is found to be warehousing numbers. Certification is not unduly burdensome since it is consistent with the *Industry Guidelines* and since it plainly requires only a small effort for a RespOrg to certify on a single form four times a year that it has a subscriber for each number it reserves, assigns, and/or converts to working status.

B. The Commission Should Establish a Cap on the Amount of Numbers a RespOrg May Hold in Reserve.

The Commission should codify the number reservation policy contained in the *Industry Guidelines* limiting the number of toll-free numbers a RespOrg may hold in reserve to 1,000,

^{1/}(...continued)

at 3 (supporting quarterly certification); Comments of LDDS Worldcom at 12 (supporting quarterly certification); Comments of Southwestern Bell at 1 (declaring that "[i]f the Commission takes only one action in this docket, it should require that all toll free numbers be assigned only to bona fide customers"); Comments of the Telecommunications Resellers Association at 16 (supporting quarterly certification); Comments of Unitel Communications, Inc. at 3; Comments of U.S. West at 17-18 (supporting quarterly certification); Comments of MCI at 9.

^{2/} *Id.*

^{3/} See, e.g., Comments of AT&T at 20 (claiming that certification should not be required "because it creates a burden without any real commensurate benefit"); Comments of BellSouth at 14 (asserting that certification "would be cumbersome to administer" and should be deferred "until and unless experience shows [a permanent reserve cap] to be inadequate"); Comments of Pacific Bell at 9 (stating that the need for certification would be obviated by making the *Industry Guidelines* mandatory).

or 15 % of its total quantity of working numbers, whichever is greater. As an element of the *Industry Guidelines*, this proposal reflects the consensus of the industry. The comments in this proceeding also support the proposal as it appears to strike an appropriate balance between the legitimate needs of RespOrgs to hold numbers in reserve, and the inefficiencies of maintaining a large pool of reserved, but unassigned numbers.^{4/}

Although a handful of the country's largest RespOrgs support a lower cap on the percentage of numbers an individual RespOrg may hold in reserve, the Commission should not adopt a percentage cap lower than 15 %.^{5/} While a lower percentage cap would not harm large RespOrgs because they control a large volume of numbers, it would significantly harm smaller RespOrgs, thus needlessly interfering with the development of competition in the RespOrg market. As U.S. West properly observes, "[a] cap lower than 15 percent might prevent a small RespOrg from adequately meeting customer demand."^{6/}

^{4/} See, e.g., Comments of Ameritech at 26; Comments of Bell Atlantic at 7; Comments of Cable & Wireless, Inc. at 12; Comments of the Competitive Telecommunications Association at 21; Comments of LCI International, Inc. at 7-8; Comments of MCI at 8; Comments of Pacific Bell at 9; Comments of Time Warner Communications Holdings, Inc. at 6; Comments of U.S. West at 17.

^{5/} See, e.g., Comments of AT&T at 8, 22-23 (proposing an 8 % cap and arguing that any lower percentage would cause "costly administrative difficulties associated with ongoing rejection, delay and re-submission of customer requests"); Comments of BellSouth at 14 (recommending a cap between 3 % and 10 %); Comments of NYNEX at 2-3 (proposing a formula "that takes into account a RespOrg's market share and growth potential as well as the diminishing supply of numbers"); Comments of Scherers Communications Group, Inc. at 14 (recommending an 8 % cap); Comments of Sprint at 10 (recommending a 10 % cap).

^{6/} Comments of U.S. West at 17. See also Comments of ATIS at 16 (noting that any cap lower than 15 % "could significantly interfere with a company's ability to do business with customers seeking toll free numbers"); Comments of MFS Communications Co., Inc. at 9 (arguing that a 3 % cap could limit the ability of new RespOrgs to maintain steady rates of growth -- "Setting a cap that is too low increases the risk for small companies and could result in their loss of significant business to larger competitors.").

C. The Commission Should Reduce the Length of Time Numbers May Be Held in "Reserved" and "Assigned" Status.

The Commission should shorten the length of time numbers may remain in either "reserved" or "assigned" status, as it has proposed. This will lessen the incidence of warehousing by forcing RespOrgs either to use their numbers or to lose them. On the basis of comments submitted by other parties, however, Promoline now believes that it is appropriate for a number to remain in "assigned" status for a period of time anywhere between four and six months.^{7/} These parties argued persuasively in their comments that legitimate reasons exist for maintaining an assignment period longer than the 60 day period originally recommended by Promoline.^{8/} They noted, for example, that many subscribers must be assured of having a particular number long before they actually use the number to receive calls. Time is needed not only to enter customer routing information into the service control points, but also to permit customers to install and test equipment, to formalize business plans, and to meet publication

^{7/} The record demonstrates substantial support for an assignment interval of this length. *See, e.g.*, Comments of AT&T at 9; Comments of Airtouch Paging at 16; Comments of Bell Atlantic at 3; Comments of BellSouth at 6; Comments of Cable & Wireless, Inc. at 2; Comments of Communications Venture Services, Inc. at 2; Comments of LDDS Worldcom at 4; Comments of the Personal Communications Industry Association at 15; Comments of Time Warner Communications Holdings, Inc. at 3; Comments of Unitel Communications, Inc. at 2.

Some commenters argued that the assignment interval must be 12 months to accommodate seasonal users who otherwise would be forced to obtain new numbers each year if the assignment interval were shorter (*e.g.*, ski resorts, annual telethons). *See, e.g.*, Comments of Scherers Communications Group, Inc. at 8; Comments of SNET at 8. This argument is not persuasive. Most seasonal users do not disconnect their numbers at the end of the season. Rather, these numbers simply remain active throughout the year and the subscribers are charged a nominal monthly fee during the off-season.

^{8/} *See, e.g.*, Comments of Ameritech at 10-11; Comments of ATIS at 7-10; Comments of the Direct Marketing Association at 6-8; Comments of NIMA International at 4-5; Comments of Sprint at 5-6.

deadlines for advertising. On the other hand, the comments reveal no valid reason for allowing a number to remain in "reserved" status longer than 30 days.

II. THE COMMISSION SHOULD PERMIT AN 800 NUMBER SUBSCRIBER TO PURCHASE A RIGHT OF FIRST REFUSAL FOR A NUMBER IN FUTURE TOLL-FREE CODES THAT ENDS WITH THE SAME SEVEN DIGITS AS ITS NUMBER.

The Commission should establish a fee-based right of first refusal that entitles 800 subscribers to acquire the seven-digit duplicate of their current numbers in future toll-free access codes. The record in this proceeding reflects broad support for this proposal.^{9/} Not only would a right of first refusal allow subscribers to protect the goodwill they have developed in their telephone numbers, it would also help to ensure that only those subscribers with a substantial and quantifiable economic interest in their numbers reserve numbers from the pool of new toll-free codes. No other proposed solution will protect the interests of incumbent subscribers as effectively as a right of first refusal.

Not surprisingly, each RBOC opposes establishing a right of first refusal. These parties assert that deferring the release of vanity numbers represents a more reasonable solution to the problems 800 subscribers anticipate,^{10/} and that trademark law is sufficient to protect subscribers

^{9/} For a representative sample of comments supporting a right of first refusal, see Comments of AT&T at 13; Comments of the 800 Users Coalition at 18; Comments of Americas Carrier Telecommunications Association at 17-18; Comments of the Direct Marketing Association at 9, 12; Comments of the General Services Administration at 2; Comments of LDDS Worldcom at 13; Comments of MCI at 15; Comments of NIMA International at 7.

^{10/} See Comments of BellSouth at 15; Comments of NYNEX at 8; Comments of Southwestern Bell at 17-18; Comments of U.S. West at 23.

from unfair competition.^{11/} The RBOCs also argue that a right of first refusal will encourage the inefficient use of scarce numbering resources.

As discussed below, neither the RBOCs' delayed release proposal nor trademark law will adequately protect the interests of incumbent 800 subscribers. Moreover, if the Commission adopts a fee-based right of first refusal, as Promoline suggests, toll-free numbers will not be used inefficiently.

A. The RBOCs' Delayed Release Proposal Will Not Work.

The RBOCs' delayed release proposal will not protect 800 vanity number subscribers from the losses they will incur if they cannot obtain the 888 analogue to their current numbers. The RBOCs argue that consumer education, together with the deferred release of vanity numbers, will be sufficient to eliminate the problems that will result from immediately releasing these numbers on a first-come, first-served basis.^{12/} If consumers are educated about the existence of the new 888 prefix, it is argued, they will be less likely to dial an 888 number to reach an 800 number subscriber.^{13/} If these education efforts are continued for long enough, 888 vanity numbers may be released on a first-come, first-served basis with no adverse effects.

^{11/} See Comments of Bell Atlantic at 7; Comments of BellSouth at 16; Comments of GTE at 9. Neither Ameritech nor Pacific Bell proposes a way to protect the interests of incumbent 800 subscribers.

^{12/} See, e.g., Comments of BellSouth at 15-16; Comments of NYNEX at 8; Comments of U.S. West at 19-20.

^{13/} See, e.g., Comments of Bell Atlantic at 8 ("By the time that additional codes are needed, the public will have been made aware of the fact that there are now multiple kinds of toll-free numbers and should be expected to take care when copying numbers and dialing."); Comments of U.S. West at 20 ("If 888 duplicates of heavy volume 800 numbers are set aside and made unavailable for a period sufficient to allow for caller education, there should be much fewer misdialed or misdirected calls . . .").

This plan will not work. If educational efforts are intended simply to inform callers that toll-free calls may be placed using either 800 or 888 numbers, as early reports indicate, this will not resolve confusion. If, on the other hand, consumers are told that 888 numbers cannot be used to reach the businesses they are used to reaching by dialing familiar 800 numbers, this plainly will generate more confusion than it would reduce.

Furthermore, education alone will not solve all of the problems a first-come, first-served allocation method will produce. Callers continue to misdial 800 numbers with great frequency, for example, even though these numbers have been in service for decades. No amount of education will solve this problem. In fact, many subscribers with high volume 800 numbers simply acquire the telephone numbers that their customers frequently misdial to counteract the effects of this problem.^{14/} People make dialing errors for a host of reasons that are not associated with their knowledge about toll-free service, and they will surely make dialing errors concerning 800 numbers and their 888 equivalent despite the most well intentioned education efforts. Deferring the release of 888 vanity numbers will not solve these problems, it will simply postpone the onset of problems.

B. Trademark Law Is Insufficient To Protect the Interests of Incumbent Toll-Free Subscribers.

While trademark law may be sufficient to protect some 800 subscribers from unfair competition, it is not sufficient to protect all 800 subscribers. Current U.S. trademark law and the policies of the U.S. Patent and Trademark Office ("Trademark Office") offer only limited - and uncertain -- protection for vanity telephone numbers. Although some courts have protected

^{14/} See, e.g., Comments of 1-800-FLOWERS at 6 (discussing its experience with customers dialing a zero instead of an "O" for "FLOWERS").

the mnemonic equivalent of telephone numbers,^{15/} one U.S. court of appeals has expressly refused to grant such protection.^{16/} The uncertainty of whether, and to what extent, uniform protection will be provided makes the courts' existing treatment of vanity numbers inadequate.

Moreover, vanity telephone numbers are afforded less protection than more "traditional" word marks under present Trademark Office policy. On January 28, 1994, the Trademark Office issued Examination Guide 1-94 to codify the Trademark Office's examination practice concerning vanity numbers. Under the heading entitled "Marks Consisting of Merely Descriptive or Generic Terms in the Form of Telephone Numbers," the following instructions were provided:

If an applicant applies to register a mark which consists of a merely descriptive or generic term with numerals in the form of a telephone number, for example 800 or 900 followed by a word, *the examining attorney should refuse registration* under Trademark Act § 2(e)(1). The fact that the mark is in the form of a telephone number is insufficient, by itself, to render a mark distinctive This policy is effective immediately and supersedes all previous guidance related to this subject.^{17/}

There is no indication that the Trademark Office intends to change existing policy to expand the scope of protection currently offered to vanity telephone numbers.

Current trademark law and practices concerning vanity telephone numbers are analogous to the limited and uncertain protection afforded to "domain names" -- the Internet equivalent of

^{15/} See, e.g., *Dial-A-Mattress Franchise Corp. v. Page*, 880 F.2d 675 (2d Cir. 1989) (protecting "1-800-MATTRESS").

^{16/} See *Dranoff-Perlstein Assocs. v. Sklar*, 967 F.2d 852 (3d Cir. 1992) (refusing to enjoin competitors from using "INJURY" in their vanity telephone numbers, despite plaintiff's "INJURY-1" vanity telephone number).

^{17/} PTO Examination Guide No. 1-94, p. 3 (Jan. 28, 1994) (emphasis added).

vanity telephone numbers.^{18/} Notwithstanding the scant case law on this relatively new topic, commentators on the scope of trademark protection for Internet domain names agree that the questions of whether, and to what extent, such names may be protectible remain unresolved.^{19/}

The ramifications of the lack of standards for protection and enforcement of Internet domain names should serve as a harbinger of the need for Commission action with regard to vanity telephone numbers. For example, the Internet Information Center offers domain name registrations on a first-come, first-served basis (as some commenters suggest the Commission should do with toll-free vanity numbers). As apparent justification for its lack of involvement in name protection, the Internet Information Center instructs users that trademark violations are the requestor's responsibility. One editorialist for *Newsday* registered the domain name "ronald@mcdonalds.com" to demonstrate the ease with which one could profit by brokering these commodities.^{20/} Such brokering flourishes absent a clearly defined and strictly enforced policy to prevent it. While it is nominally prohibited under the *Industry Guidelines*,^{21/} for instance, toll-free number brokering occurs daily. The Commission should minimize 888 number brokering by providing 800 subscribers with a right of first refusal concerning their 888 analogues.

^{18/} See, e.g., *MTV Networks v. Curry*, 867 F. Supp. 202, 203 n.2 (S.D.N.Y. 1994) ("Internet domain names are similar to telephone number mnemonics . . .").

^{19/} See, e.g., Ray V. Hartwell III & S. Demm, *Courts Unclear Whether Internet Names Infringe*, NAT'L L.J. (May 8, 1995); *Billions Registered, But No Rules: The Scope of Trademark Protection for Internet Domain Names*, 7 J. PROPRIETARY RTS. 2-8 (Mar. 1995).

^{20/} See Joshua Quittner, *Making a Name on the Internet*, NEWSDAY, Oct. 7, 1994, at A4.

^{21/} See § 2.2.1.

C. A Fee-Based Right of First Refusal Will Not Cause Toll-Free Numbers To Be Used Inefficiently.

The RBOCs argue that a right of first refusal would cause an inefficient use of numbering resources based on assumptions that (i) a large percentage of 800 subscribers will exercise the right to obtain their 888 analogues, and (ii) these subscribers will not use the 888 numbers once they acquire them. Neither assumption is correct.

First, although the RBOCs assume that a large percentage of 800 subscribers will exercise their right of first refusal, in fact the actual number of subscribers who would do so is likely to be small. One survey shows that only 6 percent of existing 800 subscribers consider their numbers to be worthy of protecting.^{22/} Since there are nearly eight million 800 numbers, this means that fewer than 500,000 numbers would be reserved from the 888 code through a right of first refusal. Under the proposal advanced by Promoline, the quantity of numbers reserved would be substantially fewer than 500,000 since subscribers would have to pay a significant fee to exercise their right.^{23/}

Second, it also is wrong for the RBOCs to assume that subscribers who reserve 888 numbers through a right of first refusal will not use those numbers efficiently. Given the

^{22/} See Comments of the 800 Users Coalition at 15-17 (this figure was derived by surveying Coalition members and examining the AT&T 800 Toll-Free Directory); see also Comments of the American Petroleum Institute at 4-5 (predicting that only a small percentage of 800 subscribers will exercise their right of first refusal); Comments of TLDP Communications, Inc. at 2-3 (estimating by mathematical analysis that less than 10% of toll-free numbers are vanity numbers).

^{23/} Incidentally, denying incumbent subscribers a right of first refusal will not conserve numbers, as the RBOCs claim. 800 subscribers who are willing to pay for a right of first refusal will undoubtedly try to reserve the 888 duplicates of their numbers under a first-come, first-served allocation plan. See Comments of Aeronautical Radio, Inc. at 5; Comments of TLDP Communications, Inc. at 1-2.

substantial fee subscribers will be required to pay for their 888 analogues, it would make poor business sense to let the numbers remain idle. Moreover, many current 800 subscribers do not have static number needs, but often require new numbers to promote different products or to perform different services.^{24/} These subscribers will need new numbers from the 888 code whether the numbers match their 800 numbers or not. Preventing incumbent subscribers from obtaining the 888 analogues to their 800 numbers will not conserve 888 numbers, but simply will reallocate those numbers among different subscribers. The difference is that incumbent subscribers may be harmed if others receive the 888 analogue to their numbers, whereas no one will be harmed if an 800 subscriber receives its own 888 analogue.

III. CONCLUSION

The Commission should adopt the anti-warehousing rules discussed above to help ensure that toll-free numbers are allocated only to those who need them. The Commission should

^{24/} See, e.g., Comments of 1-800-FLOWERS at 9; Comments of the Direct Marketing Association at 3-5.

establish a right of first refusal because this is the most effective way for subscribers to protect the goodwill they have developed in their 800 numbers.

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